In the Supreme Court of the United States

OCTOBER TERM, 1974

[illegible] INC., PETITIONER

v.

WILLIAM B. MELLAWAY,
UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF FOR MELLAWAY, MELLAWAY
AND THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
CARLA A. HILLS,
Assistant Attorney General,
ROBERT E. KOPP,
PAUL T. MICHAEL,
Attorneys,
Department of Justice,
Washington, D.C. 20530

In the Supreme Court of the United States

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No. 73-2046

THE FIVE SMITHS, INC., PETITIONERS

v.

WILLIAM H. HOLLAWAY,
UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF FOR WILLIAM H. HOLLAWAY AND THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Temporary Emergency Court of Appeals (Pet. App. A-1 to A-39) is not yet reported. The case was certified to that court without opinion by the United States District Court for the Northern District of Georgia.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on June 20, 1974. The petition for a writ of certiorari was filed on July 19, 1974. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, as amended, 85 Stat. 750.

QUESTIONS PRESENTED

1. Whether technical non-compliance with Section 553 of the Administrative Procedure Act ("APA"), 5 U.S.C. 553, by the President in issuing Executive Order 11615, which imposed a 90-day freeze on prices, rents, wages and salaries, requires that the freeze be set aside.

2. Whether the administrative interpretations of the Office of Emergency Preparedness ("OEP") should be afforded great deference.

3. Whether the application of Executive Order 11615 to the sales of football-game tickets by petitioner constituted an *ex post facto* law or deprived petitioner of its property without due process of law.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Article I, Section 9, clause 3 of the United States Constitution provides in pertinent part:

> No * * * ex post facto Law shall be passed.

The Fifth Amendment of the United States Constitution provides in pertinent part:

> No person shall * * * be deprived of * * * property, without due process of law * * * .

Section 553 of the APA, 5 U.S.C. 553 (Pet. App. A-41 to A-42) and Executive Order 11615 (Pet. App. A-44 to A-48) are set forth in the Appendix to the petition for a writ of certiorari.

Circular No. 7 issued by the OEP (36 Fed. Reg. 17578) provides in pertinent part:

> A transaction takes place when the seller ships the product to the buyer, not when the order is

> received. In the case of a service, the transaction takes place when the service is performed.

Circular No. 11 issued by the OEP (36 Fed. Reg. 18315) provides in pertinent part:

> The freeze applies to prices of advance sale tickets for sporting events occurring during the freeze.

STATEMENT

Petitioner owns and operates the Atlanta Falcons professional football team ("Falcons"). In January, 1971, the Falcons announced an increase that ranged from $1.50 to $2.50 per ticket in home game tickets for the 1971 football season. Approximately 41,500 season tickets for the 1971 season were fully paid for by the end of June, 1971, by patrons of the Falcons.

On August 15, 1971, the President issued Executive Order No. 11615 imposing a 90-day freeze upon prices, rents, wages and salaries. Under the Executive Order, prices were to be stabilized:

> at levels not greater than the highest of those pertaining to a substantial volume of actual transactions * * * of any kind during the 30-day period ending August 14, 1971, for like or similar commodities or services. [Pet. App. A-44.]

The Falcons played no home games prior to August 15, 1971. If no actual transactions occurred during the 30-day period (July 16 - August 14, 1971) ending August 14, 1971, the highest price which could have been charged was:

> the highest price * * * in the nearest preceding 30-day period in which transactions did occur. [Pet. App. A-44.]

Additionally, the President established the Cost of Living Council ("Council") and authorized it to implement Executive Order No. 11615 (Pet. App. A-45 to A-48). The Council then authorized OEP to implement and administer the Executive Order.[1]

On September 2, 1971, the OEP as an interpretation of Executive Order No. 11615, issued Circular No. 7, which provided in pertinent part:

> A transaction takes place when the seller ships the product to the buyer, not when the order is received. In the case of a service, the transaction takes place when the service is performed.

The OEP issued a further interpretation in Circular No. 11, which provided in pertinent part:

> The freeze applies to prices of advance sale tickets for sporting events occurring during the freeze.

The petitioners instituted suit in the United States District Court for the Northern District of Georgia and sought a declaration that Executive Order No. 11615 did not apply to its advance sale of football tickets for games played during the 90-day freeze and that, if it did, it was unconstitutional as an *ex post facto* law. The government also filed suit against petitioner seeking injunctive relief against the price increase.

The district court certified the constitutional issues raised by petitioner to the Temporary Emergency Court of Appeals under Section 211(c) of the Economic Stabilization Act of 1970, as amended.[2] The court of appeals ordered that all issues, both constitutional and non-

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[1] Cost of Living Council Order No. 1, 36 Fed. Reg. 16215.

[2] 85 Stat. 749.

constitutional, be presented for disposition under Section 211(c) of the Act.[3] The court of appeals held that setting aside the executive order is not a proper remedy, even assuming *arguendo* that the APA was applicable and violated (Pet. App. A-20 to A-25); that the Executive Order had been properly construed (Pet. App. A-9 to A-15); and that the Constitution had not been violated (Pet. App. A-15 to A-17, A-27 to A-29).

ARGUMENT

The same material facts and most of the issues presented in this case were before the Court in the petition for a writ of certiorari in *University of Southern California* v. *Cost of Living Council*, 472 F. 2d 1065 (T.E.C.A.), certiorari denied, 410 U.S. 928. As in *University of Southern California*, the decision of the court of appeals in the present case was correct and the petition presents no issue warranting review.

1. Petitioner contends that the President violated Section 553 of the APA when he issued Executive Order No. 11615 and imposed a 90-day freeze upon prices, rents, wages and salaries (Pet. 9-19). The government stipulated that the 30-day notice and comment period required by that Act was not afforded. Even if the APA is applicable to the President, however, the Presidential statement accompanying the rule was adequate compliance.

The APA requires advance notice of proposed rule making except "when the agency for good cause finds

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[3] Petitioner instituted *The Five Smiths, Inc.* v. *William H. Holloway* in the district court on September 23, 1971, and sought declaratory relief. The defendants in that action were government officials charged with the responsibility of implementing the 90-day freeze. The government filed an action against petitioner, *United States* v. *The Five Smiths, Inc.*, on September 25, 1971, and sought an injunction. The cases were consolidated by the court of appeals.

(and incorporates the finding and brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B). Executive Order No. 11615 did not contain such a statement.[4] However, on August 15, 1971, the day the Executive Order was promulgated, the President addressed the nation over radio and television and described the urgent and immediate need to impose economic controls. 7 *Presidential Documents*, July 5 - December 27, 1971, 1168-74. This statement, made simultaneously with the Executive Order, constituted a finding of good cause that advance notice was impracticable, unnecessary, and contrary to the public interest. The court of appeals correctly held (Pet App. A-22 to A-25) that there was substantial compliance with the APA; the violation, if any, was the technical one of placing the finding of good cause to omit giving advance notice in an accompanying statement rather than in the Executive Order itself.

Furthermore, the legislative history of the Economic Stabilization Act of 1970 indicates that Congress foresaw the need for immediate action by the President to remedy the nation's economic problem. H. Rep. No. 91-1330, 91st Cong., 2d Sess., 9, 11, 20. A price freeze would be ineffective if, during a notice and comment period, prices could be raised in anticipation. Therefore the freeze without notice was altogether appropriate and within the spirit of both the APA and the legislation giving the President the power to impose it.[5]

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[4] But the preamble to the Executive Order specifically stated, in part, that "[w]hereas, the present balance of payments situation makes it especially urgent to stabilize prices, rents, wages, and salaries * * *."

[5] Congress contemplated a freeze to "check the inflationary psychology" as a means of stabilizing the economy. *Amalgamated Meat Cutters & Butcher Workmen* v. *Connally*, 337 F. Supp. 737, 750-752 (D.D.C.).

2. Petitioner further contends that the court of appeals erroneously afforded "great deference" to the interpretations issued by the OEP (Pet. 19-29). Whether or not "great deference" is appropriate, the court below was correct in accepting the OEP's interpretation. "[p]articularly * * * when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' " *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408. In interpreting an administrative regulation, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 414. *Accord, Udall* v. *Tallman*, 380 U.S. 1, 16.

The court of appeals did not "rubber-stamp" the decisions of the OEP. Rather, the court scrutinized the interpretation and, exercising independent judgment, concluded that the interpretation was within the range of reasonable constructions to which the court will defer.

3. Petitioner has also presented the question, without discussion, whether Executive Order No. 11615, as applied, is an *ex post facto* law or deprives petitioner of property without due process of law (Pet. 2). These contentions are not persuasive.

An *ex post facto* law punishes past conduct that was not unlawful when engaged in. *Calder* v. *Bull*, 3 Dall. 386; *Ex parte Garland*, 4 Wall. 333. Neither the Act nor the Executive Order "punishes" petitioner.

This Court in *Flemming* v. *Nestor*, 363 U.S. 603, upheld a statute under which old-age Social Security

benefits were terminated because the beneficiary was deported for having belonged to the Communist Party 20 years earlier. The Court stated the governing standards as follows (363 U.S. at 614):

> Where the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected.

Here, as in *Nestor*, the legislative concern is regulatory. Although the particular refund order may "bear harshly" upon petitioner, it does not inflict punishment.

Petitioner was not deprived of its property without due process of law. The regulation simply announced a rule to govern the prices at which future services could be provided. As long as there is a rational basis for the reglatory scheme, or if it is reasonable, there is no denial of due process of law. *Richardson* v. *Belcher*, 404 U.S. 78, 84. In *University of Southern California*, *supra*, 472 F. 2d at 1072, the court of appeals correctly held the administrative action in question here "to be a reasonable and consistent interpretation of the Executive Order * * *."

4. The administrative actions sought to be reviewed here were temporary measures extending only through the 90-day emergency freeze period in 1971. The Economic Stabilization Act expired in its entirety at midnight on April 30, 1974,[6] and there are only two other cases

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[6] 87 Stat. 29.

currently in litigation which involve the issues presented.* The issues relating to the Economic Stabilization Act and the validity of the implementing Executive Order and regulations therefore have little prospective importance.

CONCLUSION

For the foregoing reasons, it it respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

CARLA A. HILLS,
Assistant Attorney General.

ROBERT E. KOPP,
PAUL T. MICHAEL,
Attorneys.

SEPTEMBER 1974.

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* We noted in our memorandum in opposition to the petition for a writ of certiorari in *University of Southern California* that there were only two other cases pending in the district courts at that time. One of those two cases is the present action. The other case, *Oakland Raiders* v. *Office of Emergency Preparedness*, petition for certiorari filed, No. 74-85, August 7, 1974, is now before this Court. Since that time one additional case was filed, *United States* v. *Cleveland Browns, Inc.*, Civ. No. 73-839 (N.D. Ohio), appeal docketed, No. 6-7, T.E.C.A., July 25, 1974, and is currently pending in the court of appeals.